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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM 1983

COLORADO RIVER INDIAN TRIBES,
Petitioner,

vs.

GERALD ARANSON, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RUSSEL LAWRENCE BARSH
COUNSEL OF RECORD
SIDNEY C. FLORES
FLORES, ESTREMERA & BARRIOS
95 South Market Street,
Suite 250
San Jose, California 95113
Telephone: (408) 292-3400
Counsel for Petitioner

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTION PRESENTED

(1) Has *Montana v. United States*, 450 U.S. 544 (1981), changed this Court's rule that express reference to the median line or far shore of a navigable body of water in the instrument establishing an Indian reservation is evidence of the United States' intention to confirm or convey the bed?

(2) Does historical tribal dependence on irrigated agriculture, like historical tribal dependence on fishing, overcome the presumption against conveyance of submerged lands by the United States?

PARTIES INVOLVED

United States of America, Plaintiff-Appellee; Gerald Aranson and Jan Furst Aranson, his wife; Blythe Land Properties, a Limited Partnership; Joe B. Finley, individually and as President of Western Cattle Feeders, and Florence S. Finley, his wife; Murray M. Hausner and Leonore Hausner, his wife; Jared C. John, Jr., and Alice B. John, his wife; Edward Meltzer and Frieda A. Meltzer, his wife; Arthur Ourieff and Verni Ourieff, his wife; Jack M. Ostrow; Prima Rosa Land and Cattle Company, A Partnership; Arthur I. Berman; Martin A. Levy; Western Cattle Feeders, a California corporation; Virgil L. Jones, individually and as President of Board of Trustees of Palo Verde Irrigation District; Rancho Del Juan, Inc., an Arizona corporation; Neil John, individually and as President of Rancho Del Juan, Inc.; C. P. Richins and Sons, a Partnership; Charles P. Richins, Jr., and Agnes Richins, his wife; Norman E. Richins and Winifred Richins, his wife; Lawrence D. Richins, individually and as President of Sunrise Farms and as President of Riverview Farm and Tillage Company, and Barbara Richins, his wife; Riverview Farm and Cattle Company, a Partnership; Arnold M. Travis and Joan D. Travis, his wife; Riverview Land Company, a California corporation; C. P. Richins, individually and as President of Riverview Land Company; Sunrise Farms, a California corporation; Harry B. Swerdlow; Travis Farms, a Partnership; Joe B. Finley, Jr., and Mary C. Finley, his wife; R. W. Bilbo and Kathryn S. Bilbo, his wife; Arizona Farmers Production Credit Association; Bank of America National Trust and Savings Association; Desert Ginning Company, Inc., an Arizona corporation; Blythe Feed Yards, a Partnership; The Federal Land Bank of Berkeley; Riverview Farm and Tillage Company, a California corporation; Northwestern Mutual Life Insurance Company; Los Angeles Period Furniture Company, Inc.; Julius Fligelman, individually and as President of Los Angeles Period Furniture Company, Inc., Defendant-Appellant.

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The Colorado River Indian Tribes, the federally-recognized governing body of the confederated Mohaves and Chemehuevis of the Colorado River Indian Reservation, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The original opinion of the Ninth Circuit in this case, not officially reported but attached as an appendix hereto (Appendix A), was issued on March 30, 1981. On April 17, 1981 the Ninth Circuit withdrew this opinion and invited the parties to submit supplemental briefs in light of this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981). A revised opinion was issued on January 10, 1983, and is reported at 696 F.2d 654 (Appendix B).

JURISDICTION

The Ninth Circuit denied Petitioner's petition for a rehearing *en banc* in this case on May 13, 1983. This petition for certiorari was timely filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Act of March 3, 1865, 13 Stat. 541, 559:

> All that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River, containing about seventy-five thousand acres of land, shall be set apart for an Indian reservation for the Indians of said river and its tributaries.

25 U.S.C. § 194:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

STATEMENT OF THE CASE

The Mohaves and Chemehuevis were aboriginal inhabitants of the lower Colorado River. They subsisted by cultivating corn, beans, melons and pumpkins, using the river's waters to saturate the desert, and by fishing. There was little hunting in the valley, and settlements clung along the river's banks.

Congress established the Colorado River Indian Reservation in 1865 by setting aside a portion of the Mohaves' aboriginal territory within what was then the Territory

of Arizona. Act of March 3, 1865, 13 Stat. 541, 559. Congress used the river as a western boundary, but did not specify whether the line was to run down the near or far shore. The reservation was expanded by an Executive Order of November 22, 1873, and extended *across* the Colorado River at its northern end by an Executive Order of November 16, 1874. The river itself continued to serve as the reservation's southwest boundary.

An Executive Order of May 15, 1876, restated and clarified the reservation's boundaries as follows:

> Beginning at a point where La Paz Arroyo enters the Colorado River and 4 miles above Ehrenberg; thence easterly with said Arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction *over the Colorado River* to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning *to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning;* thence to the place of beginning.

The course of the river has not remained stable. After the construction of Laguna Dam in 1909, it migrated westward into California, forming a large bend (Map, Appendix C). The Palo Verde cutoff isolated this bend in 1920, returning the river to a more easterly course. These changes in the course of the reservation's boundary river raised three questions:

> (1) Did the river's westward migration (1909-1920) enlarge the Colorado River Indian Reservation at the expense of California?

(2) Did the artificial elimination of the river's bend in 1920 restore this land to California?

(3) Did the reservation include the bed of the Colorado River as well as the fast land lying east of its course?

This suit was instituted by the United States in 1972, acting as trustee for the Colorado River Indian Tribes. After a 1977 decision favorable to the Tribes, all of the defendants except the State of California appealed.[1] The Tribes themselves intervened by leave of the Ninth Circuit during the course of the appeal, followed by the State of Arizona.

At first, the Ninth Circuit affirmed. Applying the principles of accretion and avulsion, it concluded that the river's westward migration had enlarged the reservation, and that the 1920 cutoff had not diminished it. Congressional intent to include the riverbed was to be inferred from the Indians' historical dependence on agriculture for subsistence (1981 Opinion, Appendix A). After reconsideration in the light of *Montana v. United States*, however, the Ninth Circuit found *insufficient evidence* of Congressional intent to include the riverbed in the reservation. 696 F.2d at 666. It remanded for consideration of whether the Tribes had aboriginal title to the riverbed *prior* to the establishment of the reservation in 1865, such that a Congressional grant would not have been necessary.

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[1]The State of California, originally a party to this litigation, did not join in the appeal, apparently because the United States did not press claims to the west half of the riverbed and the district court made no findings in that regard. Petitioner did not waive its claims to the west side of the riverbed, however, and intervened on appeal to prevent any inappropriate concessions by the United States.

Petitioner only seeks review on the issue of the United States' intent to confirm or convey the bed of the Colorado River to the Tribes in the Act of March 3, 1865, and the clarifying Executive Order of May 15, 1876.

Certiorari should be granted because the Ninth Circuit has cast doubt on the effect of *Montana v. United States* on this Court's earlier decisions in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), and *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), neither of which was overruled. *Choctaw Nation* held that Congress' confirmation of an Indian reservation to the median line of a navigable river implies conveyance of the riverbed to that line. *Alaska Pacific Fisheries* held that conveyance of submerged land would also be implied if the Indians were aboriginally dependent on boundary waters for their subsistence, as by fishing, and Congress intended this way of life to continue. *Montana* concluded that the Crow Tribe's claims to the bed of the Big Horn River fit neither the *Choctaw Nation* nor the *Alaska Pacific Fisheries* rules since the river was not mentioned in the treaty creating the reservation, and the Crows did not fish or otherwise depend on the river for subsistence.

In this case Congress and the President expressly extended the reservation *to the far shore* of the boundary river. Referring to *Montana*, however, the Ninth Circuit held that this was not sufficiently explicit. "The *Montana* decision foreclosures any argument that Congress intended to convey lands underlying navigable waters unless an express reference *to the bed* beneath the waters can be found in the grants establishing the reservation." 696 F.2d at 664 (emphasis supplied). This, Petitioner believes, is

much more restrictive than *Montana* contemplated, and overrules *Choctaw Nation*, where the median line *but not the bed* of the river was mentioned by Congress.

Unlike the Crows, moreover, Petitioner was aboriginally dependent on cultivating crops, watered by the Colorado River, and on fishing. The reservation was expressly set aside to preserve and, through better irrigation, improve Petitioner's agriculture. Although the Ninth Circuit conceded that *Montana* "permits a court to infer congressional intent to convey the bed beneath navigable water *if the Indians can prove they depended heavily* on the particular body of water," it held that Petitioner's econmoy was "not *so* dependent on the river that Congress would have intended" to convey the bed. 696 F.2d at 666 (emphasis supplied). This, too, is overly restrictive. A tribe subsisting almost exclusively on irrigated crops and fish is no less dependent on water than one that subsists almost entirely on fish alone.

The Ninth Circuit paradoxically continues to recognize *fishing* tribes' ownership of submerged lands, relying on the authority of *Alaska Pacific Fisheries. E.g., Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982); *United States v. Washington*, 694 F.2d 188, 189 (9th Cir. 1982). But the proper test is not fishing, *per se*, but economic dependence, past and present, on the waterway.

Besides distinguishing unjustifiably between irrigated agriculture and fishing, the Ninth Circuit misplaced the burden of proof under 25 U.S.C. § 194. As this Court explained in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 669 (1979), "[s]ection 194 contemplates the non-Indian's

shouldering the burden of persuasion as well as the burden of producing evidence once the Tribe has made out its prima facie case of prior title or possession." Furthermore, it has been the consistent practice of this Court to construe ambiguous enactments in tribes' favor, especially in disputes over land and resources. *Washington v. Fishing Vessel Association*, 443 U.S. 658, 690 (1979); *Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968). On the contrary, the Ninth Circuit disregarded the *express* language of the 1865 Act and 1876 Executive Order, and abundant, *uncontradicted* evidence of Petitioner's historical dependence on the Colorado River for subsistence.

REASONS FOR GRANTING THE WRIT

1. The United States Confirmed or Conveyed the Bed of the Colorado River to Petitioner By Clear and Express Words

This Court last considered a similar set of facts in *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). The Choctaws claimed half the bed of the Arkansas River under a treaty which used the river's median line as a boundary. Writing for the unanimous Court, Justice Marshall relied on the "natural inference . . . that all the land within (the treaty's) metes and bounds was conveyed, including the banks and beds of rivers." 397 U.S. at 634. This inference was irresistible where the median line of the river itself was a boundary, since Congress easily could have referred to the near shore if it had contemplated excluding the riverbed.

In *Confederated Salish and Kootenai Tribes v. Namen*, 665 F.2d 951 (9th Cir. 1982), the applicable treaty expressly bisected Flathead Lake in describing the boundar-

ies of the Flathead Indian Reservation. The Ninth Circuit reasoned,

> Had Congress intended *not* to convey the southern half of the lake to the Indians, it could easily have defined the Reservation's northern boundary, upon reaching the west shore of the lake, as running along the shore of the southern half of Flathead Lake.

665 F.2d at 962 n. 28. Courts may not disregard the plain meaning of statutory words absent persuasive evidence, from legislative history, that some other meaning was intended. *Burns v. Alcala*, 420 U.S. 575, 580 (1975). Nor may courts treat any of the statutory words Congress uses as mere surplusage. All must be given effect. *United States v. Marubeni American Corp.*, 611 F.2d 763, 767 (9th Cir. 1980); *Conway County Farmers Assoc. v. United States*, 588 F.2d 592, 598 (8th Cir. 1978); *Application of Barker*, 559 F.2d 588, 592 (Cust. & Pat. App. 1977). If Congress runs the boundary of an Indian reservation through the middle of a river or a lake, rather than along the shore, it must be presumed to have acted with deliberation, and meant what it said.

The same reasoning applies here. If the United States had intended to exclude the Colorado River from the Colorado River Indian Reservation, it could have run the reservation's western line down the near shore of the river, rather than the far shore. Nothing would have been simpler—nor can the use of the far shore have any plausible significance except as evidence of intent to make the riverbed part of the reservation. It would be absurd for a grant running to the middle of a lake (*Namen*) or river (*Choctaw Nation*) to convey the bed, but a grant running all the way to the far shore to convey nothing.

2. Petitioner Has Demonstrated Both Aboriginal and Contemporary Dependence On the Waters of the Colorado River for Agriculture and Fishing

After concluding that the Crow treaty "did not by its terms formally convey" the bed of the Big Horn River to that tribe, *Montana* further held that "fishing was not important for their diet or way of life." 450 U.S. at 553, 556. This distinguished *Montana* from *Alaska Pacific Fisheries v. United States*, 248 U.S. 18 (1918), which held that a reservation purposely established so that a fishing tribe could continue to subsist by fishing necessarily implied the conveyance of submerged lands.

> They were largely fishermen and hunters, accustomed to live from the returns of these vocations, and looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a primary means of subsistence and a promising opportunity for industrial and commercial development.

248 U.S. at 88. Since the "Indians could not sustain themselves from the use of the upland alone [and] the use of the adjacent fishing grounds was equally essential," Congress must have intended to include boundary tidelands in the reservation. 248 U.S. at 89. Also see *United States v. Romaine*, 255 F. 253 (9th Cir. 1919); *Moore v. United States*, 157 F.2d 760, 764 (9th Cir. 1946).

The Crows failed to satisfy the *Alaska Pacific Fisheries* test because they were primarily an upland hunting people and could not show any aboriginal or contemporary dependence on the Big Horn River for subsistence. The Colorado River Tribes could not be more different. Mohaves and Chemehuevis have been farmers since remote antiquity. They used both the natural flooding of the river

and artificial irrigation to water their crops, an absolute necessity in the midst of a severe desert. Each family owned a strip of land alongside the river to take advantage of natural and artificial overflows. Fishing was their main source of animal protein. The aboriginal boundaries of Mohave territory and the subsequent location of the reservation within it were determined by this riparian economy.

According to a modern study, the Mohaves obtained about half of their aboriginal subsistences from riparian agriculture.[2] As early as 1604, Spanish explorers found the Mohaves tending "beautiful cornfields very well cultivated with abundant crops of maize, beans and pumpkins."[3] "All sorts of crops are to be found," Fray Francisco Garces reported in 1775, "and in places the cultivable lands are so extensive that they can support the inhabitants and many others besides."[4] A numerous and powerful people, the Mohaves supplied the Spanish with food and guides for the exploration and settlement of the upper Colorado.

The earliest American travellers along the lower Colorado were also impressed by the diversity of Yuman[5]

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[2]E. Castetter and W. Bell, *Yuman Indian Agriculture* 74, 138 (1951).

[3]H. Bolton, ed., 1 *Kino's Historical Memoir of Primeria Alta* 217, 110 (1936).

[4]J. Galvin, ed., *A Record of Travels in Arizona and California, 1775-1776* 86 (1965).

[5]The Mohaves are one of several "Yuman" peoples closely related by language and history, living adjacent in the lower Colorado region and including the Gila-Maricopa and Yuma. Mohaves and Chemehuevis have been united for centuries. House Executive Document 90, 36th Congress, 1st Session (1861), at 72-73. They are identified as a confederated people in section 2(a) of the Act of April 30, 1964 (P.L. 88-302), 78 Stat. 188.

agriculture practiced, as in ancient Egypt, on riparian lands saturated by the river's spring floods. Army Major S. P. Heintzelman, writing from Fort Yuma on the California side of the river in 1853, noted that

> The river bottom is wide and fertile . . . and is intersected by a great number of sloughs and lagoons, former beds of the river. On these the Indians plant in the month of July, or so soon as the waters of the annual rise commence to subside. No vegetables will grow beyond the influence of the overflow.
>
> They cultivate water melons, musk melons, pumpkins, corn and beans. The water melons are small and indifferent, musk melons large, and the pumpkins good. These latter they cut and dry for winter use.
>
> Wheat is planted in the same manner, near the lagoons, in December or January, and ripens in May and June. It has a fine plump grain, and well-filled ears.[6]

"They subsist almost exclusively on beans and corn, with occasional watermelons and pumpkins," Lieutenant Ives wrote during an 1857-1858 military survey, "and are probably as fine a race, physically, as there is in existence."[7]

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[6]House Executive Document 76, 34th Congress, 3rd Session (1857), at 36-37. See, similarly, *Report of the Commissioner of Indian Affairs, 1866*, at 109-110; E. Trippell, *The Yuma Indians*, 13 Overland Monthly (2nd Series) 561, 573-74 (1899); A. Kroeber, *Handbook of the Indians of California* 736, Bureau of American Ethnology Bulletin No. 78 (1925); A. Kroeber, *Preliminary Sketch of the Mohave Indians*, 4 American Anthropologist (new series) 276 (1902); L. Spier, *Yuman Tribes of the Gila River* 58-61 (1933); E. Castetter and W. Bell, *Yuman Indian Agriculture, supra*, 69-70.

[7]House Executive Document 90, 36th Congress, 1st Session (1861), at 73.

Early efforts by whites to cultivate the same lands were disastrous. Lieutenant Sweeny wrote from Camp Yuma that

> We tried very hard to raise garden vegetables here this year, and were almost certain of success in consequence of the overflow of the river and the unusual quantity of rain that had fallen, but it proved a complete failure. It is the general opinion here now that nothing can be raised in these diggings except by the Indians, or those who adopt their plan of encamping on the planting grounds and protect them from the animals and insects that swarm around the young plants, and will certainly destroy them if not driven off.[8]

Military officers and American settlers in the region generally supplied themselves with corn and melons purchased from Yuman farmers.[9] "On the lower Colorado there was liberality to a fault."[10]

There is at least some evidence of Yuman use of ditch irrigation by the 1850s. When John Russell Bartlett passed through the valley in 1853, he found the river's waters "turned off by the Indians to irrigate their lands."

> I have not cited the agriculture of these tribes as superior to that of all other Indians; although I may be safe in saying that the system is more extensively and methodically practised than elsewhere. The

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[8]A. Woodward, ed., *Journal of Lt. Thomas W. Sweeny, 1849-1853* 175-76 (1956).

[9]*Report of the Commissioner of Indian Affairs, 1864,* at 304; House Executive Document 90, *supra,* 70, 83; E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 71.

[10]E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 71.

> Yumans, and other tribes on the Colorado irrigate their lands, and raise wheat, corn, melons, etc.[11]

There also appears to have been some use of natural swales, modified to capture the flood waters as the river receded in early summer, and as late as 1941 water was often hand-carried from the river to parched adjacent fields.[12]

Lieutenant Ives was the first to suggest that "a system of irrigation and an improved method of agriculture would make the valley more productive."[13] In proposing the establishment of a reservation for the Colorado River tribes, the Commissioner of Indian Affairs accordingly recommended construction of an irrigation canal to water Indian crops.[14] A.F. Waldemar, the Army engineer assigned to survey the reservation, was "surprised at the great quantity of rich bottom land and alluvial soil" in Mohave country, and concluded that

> The most humane and cheapest way to provide permanently for the Indians, and educate at least their rising generation to useful labors, would be, in my humble opinion, that the government not only give them the land between Halfway Bend and Corner Rock, but also assist them in digging an irrigation canal from the Mesa towards Halfway Bend. They would then become undependent of the uncertain rise

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[11] J. Bartlett, *Personal Narrative of Explorations and Incidents in Texas, New Mexico, California, Sonora, and Chihuahua* 215, 262-63 (1854).

[12] E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 132-33, 135.

[13] House Executive Document 90, 36th Congress, 1st Session (1861), at 73.

[14] *Report of the Commissioner of Indian Affairs, 1864,* at 300-1.

> and fall of the river, could raise regular crops, and would soon be able to sell a large surplus.[15]

The following year, Congress established the Colorado River Indian Reservation noting, in the course of debate, the tribes' agricultural reliance on the river's flow. Act of March 3, 1865, 13 Stat. 541, 559; 38 *Congressional Globe* 1320 (1865).

Funds for irrigation were appropriated in 1867 and construction began the next spring.[16] Geological and topographical obstacles were formidable, and in 1873 the resident Indian Agent resorted to forced Indian labor, promising to supply Mohave workers with food only—a promise later broken.[17] Between 1872 and 1882 about one acre per capita was under cultivation on the reservation, mostly in wheat, corn and beans,[18] but reliable irrigation was not available until the 1940s. By this time the construction of Laguna (1909), Boulder (1935) and Parker (1938) dams had reduced the river's annual floods considerably, causing a severe decline in Mohave acreage and yields.[19]

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[15] *Id.* 304.

[16] Act of March 2, 1867, 14 Stat. 492, 514-15; Act of July 27, 1868, 15 Stat. 198, 222; Act of May 29, 1872, 17 Stat. 165, 188; *Report of the Commissioner of Indian Affairs, 1868*, at 137.

[17] *Report of the Commissioner of Indian Affairs, 1873*, at 285; *Report of the Commissioner of Indian Affairs, 1876*, at 5; *Report of the Commissioner of Indian Affairs, 1877*, at 1.

[18] *Report of the Commissioner of Indian Affairs, 1872*, at 58; *Report of the Commissioner of Indian Affairs, 1882*, at 3. Aboriginal cultivation has also been estimated at about 1-2 acres per household. E. Castetter and W. Bell, *Yuman Indian Agriculture, supra*, 75.

[19] E. Castetter and W. Bell, *Yuman Indian Agriculture, supra*, 76-77, 135-36.

There is no doubt that Congress established the reservation to protect and improve the tribe's agriculture, which was aboriginally dependent on flooding and limited artificial irrigation, and for the future increasingly dependent on artificial irrigation alone. Today, one-third of the reservation's 287,000 acres is under irrigated cultivation, chiefly in cotton (44 per cent), alfalfa (40 per cent), lettuce and melons. With rainfall of less than 10 inches yearly, summer temperatures commonly rising to 110-115°F, and no important mineral reserves, the reservation is habitable only through judicious, water-intensive cultivation of riparian lands.

Fishing was also an important part of the aboriginal Mohave diet. "The Mohave hunted little," observed the eminent anthropologist Kroeber. "They fished more."[20] Minnows, carp, suckers and humpback were hooked, netted, trapped or scooped by various means.[21] Kroeber explains:

> The fish of the muddy Colorado are rather soft and unpalatable to the white man, but the Mohave caught quantities and relished them. Game is very scarce in the valley, and the Mohave rarely left their country to hunt.[22]

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[20]A. Kroeber, *Preliminary Sketch of the Mohave Indians, supra,* 276. Also see *Report of the Commissioner of Indian Affairs, 1870,* at 594; *Report of the Commissioner of Indian Affairs, 1871,* at 364; E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 211-12, 238.

[21]E. Trippell, *The Yuma Indians, supra,* 574; E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 219-22.

[22]A. Kroeber, *Handbook of the Indians of California, supra,* 737; E. Castetter and W. Bell, *Yuman Indian Agriculture, supra,* 218; House Executive Document 90, 36th Congress, 1st Session (1861), at 73.

Yumans served fish to the first Spanish explorers of the river in 1700.[23] Hydroelectric development and growing diversions of Colorado River water for irrigation upstream have reduced many fish stocks and, consequently, reduced Yuman reliance on this source of protein.

The Ninth Circuit's failure to acknowledge these historical facts in its January 10, 1983 opinion is confusing, since it relied on them previously. In its March 30, 1981 opinion (Appendix A), it found that

> Examination of the history and lifestyle of the Mohave Indians, the principal tribe on the reservation, suggests that the government intended to convey the riverbed as part of the reservation. At the time the reservation was created, Congress was aware that the Mohaves were heavily dependent upon the Colorado River; having been cut off from traditional hunting grounds, the Indians risked frequent famine without the ability to divert the river and alter its course for irrigation purposes.

It is difficult to understand why the Ninth Circuit reversed itself on this point. *Montana* did not alter the course of history, or make the Mohaves any less reliant, aboriginally, on the Colorado River than they were before. No new facts were introduced by Respondents after the Circuit's 1981 decision, nor did the Circuit invite rebriefing of the matter. Indeed, when Petitioner moved the Circuit to take judicial notice of additional documentation of Mohave fishing on November 19, 1981, the panel declined to rule on the motion.

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[23] E. Castetter and W. Bell, *Yuman Indian Agriculture*, *supra*, 220.

3. Petitioner's Claims to the Riverbed Precede the Admission of Arizona and California to the Union

The pivotal legal issue in *Montana* was an aspect of the Equal Footing doctrine: a presumption that public lands beneath navigable waters vest in new states at the time they are admitted to the Union.[24] Congress nonetheless has power to dispose of submerged lands prior to statehood to fulfill treaties and other national obligations, *Shively v. Bowlby*, 152 U.S. 1 (1894), and to retain these lands after statehood for national purposes, *United States v. Rio Grande Dam & Irrigation Co.*, 164 U.S. 690 (1899), including the protection of Indian waters and fisheries, *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). It simply must be relatively explicit about its intentions and purpose. Once a state has been admitted, further Congresional dispositions of submerged lands are ordinarily without effect. *Borax Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10 (1935). California became a state in 1850. Act of September 9, 1850, 9 Stat. 452.

Montana was based on the parties' representations that the Crows' rights arose from a pre-statehood *grant*. The appropriate question, then, was whether the grant was sufficiently explicit respecting the bed of the Big Horn River, and this Court concluded that it was not. On the contrary, Petitioner here bases its claims on aboriginal possession and ownership, which Congress *would have had to extinguish, explicitly*, before any part of it could vest in a new

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[24]See, generally, R. Barsh and J. Henderson, *Contrary Jurisprudence: Tribal Interests in Navigable Waterways Before and After Montana v. United States*, 56 Washington Law Review, 627, 654-661 (1981).

state. *United States v. Dann*, 706 F.2d 919 (10th Cir. 1983); *Oneida Nation v. County of Oneida*, 414 U.S. 661 (1974); *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339 (1941). Aboriginal ownership includes all natural resources which the Indian inhabitants customarily used. *Santa Fe Pacific R.R. Co., supra; Shoshone Trive v. United States*, 299 U.S. 479 (1937).

Respondents must therefore identify an express Congressional extinguishment of Petitioner's claims before Petitioner need demonstrate an express Congressional grant prior to statehood. It is already a matter of public record that the Colorado River Indian Reservation is a part of the aboriginal territory of the Mohaves, and that the Reservation's location was chosen with this fact in mind.[25]

Even if California acquired some interest in the bed of the Colorado River within Petitioner's reservations in 1850, its claims were relinquished by the Act of May 15, 1862, 1862 Cal.Stat. at L. ch. 452:

> Section 1. All lands belonging to this State, and situated within any Indian Reservation belonging to the United States in this State, are hereby granted to the United States for the use of said reservation . . . .
>
> Section 2. This act shall take effect from and after its passage.

California must base any contemporary claims on federal legislation expressly severing the riverbed from Petitioner's reservation after 1865.

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[25] *Report of the Commisioner of Indian Affairs, 1868*, at 137.

There is one additional consideration rendering the early date of California statehood immaterial: the boundary between California and Arizona was not settled until 1966. Act of August 11, 1966 (P.L. 89-531), 80 Stat. 340. In the meantime, Congress had explicitly confirmed Petitioner's title to the reservation described by the May 15, 1876 Executive Order—that is, bounded on the west by the far shore of the Colorado River. Act of April 30, 1964 (P.L. 88-302), 78 Stat. 188. State legislation ratifying the new Arizona-California boundary did not disturb, but expressly preserved preexisting rights and titles. 1963 Cal.Stats. ch. 859, § 4; 1963 Ariz. Sess.Laws ch. 77, § 5.

In any event, California's 1850 admission to the Union only affects the west half of the riverbed. The east half remained within the Territory of Arizona until 1910, long after the 1865 act establishing the Colorado River Indian Reservation and the 1876 Executive Order clarifying its boundaries. Act of June 10, 1910, 36 Stat. 557.

CONCLUSION

For the foregoing reasons, Petitioner suggests that a writ of certiorari should be issued to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

Russel Lawrence Barsh
Sidney C. Flores
Flores, Estremera & Barrios
95 South Market Street,
Suite 250
San Jose, California 95113
Telephone: (408) 292-3400
Counsel for Petitioner

(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

United States v. Aranson, et al.

No. 77-2295 (9th Cir., March 30, 1981)

Abridged Text

Before TRASK and SNEED, Circuit Judges, and EAST, District Judge sitting by designation

SNEED, Circuit Judge

The proper resolution of this appeal has proved as difficult to divine as determining the course of the Colorado River in the Palo Verde Valley during the period of time with which this case is concerned. Both have proved elusive, and, even now, some doubt with respect to both remains. The appeal is from the decision of the district court adjudging certain lands in what is referred to as the Olive Lake region of the Palo Verde Valley to be the property of the United States, acting as trustee for the Colorado River Indians, and ordering appellants to pay damages because of their wrongful occupation of those lands. Appellants maintain that the district court should have granted their motion for a new trial because of a change in the applicable law. Appellants also contend that the district court erred in concluding that the Colorado River Indian Reservation included the easterly half of the bed of the Colorado River. We affirm.

I

In 1865, Congress created the Colorado River Indian Reservation by setting apart certain lands within what was

then the Territory of Arizona. Act of Mar. 3, 1865, ch. 127, 13 Stat. 541, 559. The boundaries of the reservation were modified or redefined by executive orders issued on November 22, 1873; November 16, 1874; May 15, 1876; and November 22, 1915. *See Executive Orders Relating to Indian Reservations, 1855-1922*, pt. I, at 6, 7; pt. II, at 5, 6 (1975).

The reservation extended westward to, and in some places beyond, the Colorado River, which formed the boundary between California and Arizona. The river, however, did not maintain a constant course. Over the years it carved out various channels through the Palo Verde Valley. Three of those channels are critical to this case. For our purposes, the 1908 channel refers to the course followed by the river before the completion in 1909 of the Laguna Dam, which is located downstream from the Palo Verde Valley. It appears in Appendix A to this opinion. In the decade following completion of the dam, the river moved gradually westward, as soil was eroded from the California bank and deposited on the Arizona side. By 1915 its location was as depicted by Appendix B, and by 1919 the course of the river had formed a bend or loop known as the "Olive Lake Bend" which Appendices C and D reflect. We shall refer to the river's course at this time as the 1919 channel. In 1920, the Palo Verde Mutual Water Company, with the authorization of the United States Department of the Interior, constructed a cut-off channel across the neck of this bend. Appendix E shows the location of the cut-off as proposed. By 1921, the entire river had moved into this cut-off channel, described as the Olive Lake Cut, and was following a course to the east of both the 1908 channel and the westerly, 1919 channel. We shall refer to this last course as the 1921 channel. The record contains no drawing of the 1921 channel although Appendix F fixes the channel as of April

1925 somewhat east of the present course of the river. Obviously the 1921 channel was also east of the present river.[1]

Uncertainty over the shifting state border led California and Arizona to fix the line in a Boundary Pact which was approved by Congress in 1966. Act of Aug. 11, 1966, Pub. L.No.89-531, 80 Stat. 340. The Pact did not affect property claims or titles, and the states' ratifying statutes provided that titles, rights, or claims would not be prejudiced by the Pact's designation of the state boundary line. 1963 Ariz. Sess.Laws ch. 77, § 5, reprinted in annotation to Ariz.Rev. Stat. Ann. § 41-522 (West 1974); 1963 Cal. Stats. ch. 859, § 4, reprinted in annotation to Cal.Gov't Code § 175 (West 1980).

On July 17, 1972, the United States in its capacity as trustee for the Indians commenced this action seeking to quiet title to those lands situated on the California side of the present channel and east of the median line of the 1919 channel. Various individuals and corporations, as well as the Palo Verde Irrigation District and the state of California, were named as defendants. The private defendants had acquired lands in the Olive Lake region, apparently from previous occupants, some years after the construction of the Olive Lake Cut but before the adoption of the Arizona-California Boundary Pact. The Palo Verde Irrigation District, a public district of the state of California claims lands in the Olive Lake region and regulates water usage in the vicinity. The Indians contended, however, that the Colorado River Indian Reservation extended to the median line of the 1919 channel and that, because the Olive Lake

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[1]The course of the river now appears to be somewhat to the west of the Olive Lake Cut. In resolving the issues of this case, however, we need not consider changes occurring after 1921.

Cut had effected an avulsive change in the course of the river, their title to this land was never lost. They therefore asked that the defendants be required to remove themselves and their personal belongings from the land and to pay damages for wrongful possession.

At trial, the dispute focused on the issue of whether the change in the river's course from the 1919 channel to the 1921 channel was the result of avulsion or accretion. The district court found that the change had been avulsive and concluded that title to the lands had remained in the Indians. The district court also found that the reservation included the eastern half of the bed. Thus, the court held that the Indians presently hold title to the lands each of the median line of the 1919 channel, and that the state of California owns the bed west of that median line. The court also ordered the defendants, except the state of California, to pay damages for wrongful possession.

Although the district court announced its decision on November 17, 1976, the court's findings of fact, conclusions of law, and judgment were not filed until February 11, 1977. In the intervening period, the Supreme Court rendered its decision in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), in which the court overruled its previous decision in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973). Arguing that the district court had relied on federal law and that under *Corvallis* the case should be resolved under state rather than federal law, the defendants, except the state of California, moved for a new trial. The motion was denied, and defendants, again save for the state of California, appealed.

Appellants raise two issues. They contend that the property dispute is governed by California law, not federal law. Under California law, in appellants' view, the Indians would not have obtained title to any accretions which were artificially caused. Hence, appellants request a new trial in order to prove that the lands in question were deposited on the Arizona side of the river as a result of artificial accretions caused by the construction of the Laguna Dam in 1909. Appellants also contend that the Indian reservation did not include the eastern half of the riverbed and that the district court's determination of the reservation's western boundary was thus incorrect. We shall address these issues separately.

II

In *Bonelli Cattle Co. v. Arizona, supra,* the Supreme Court held that a dispute between a private claimant and the state of Arizona over title to land within the abandoned bed of the Colorado River was governed by federal law. Consistent with *Bonelli,* the district court decided this case on the basis of federal law. The overruling of *Bonelli* by *Corvallis* enables the appellants to argue that this case must be decided according to state, not federal law, and that the district court should thus have granted their motion for a new trial. The appellee contends that *Corvallis* is inapplicable here because, unlike the Willamette River, which was the source of the controversy in *Corvallis,* the Colorado River until 1966 formed the boundary between two states.

We believe this dispute concerning the proper application of *Corvallis* was resolved by the Supreme Court's recent decision in *Wilson v. Omaha Indian Tribe,* 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979). The claimant in *Wilson*

was a tribe of Indians whose reservation, located in Nebraska, was bounded on the east by the Missouri River. Prior to a compact made in 1943, the river had also marked the state boundary between Nebraska and Iowa. The tribe claimed lands that had once been part of the reservation but which, due to changes in the river's course, had passed to the Iowa side of the river. The Supreme Court held that the Indians' claim was governed by federal law but that state law should be adopted as the rule of decision. *Id.* at 669-76, 99 S.Ct. at 2539-42. This holding governs this case. It follows that the substantive rule of decision in this case with respect to issues arising from changes in the course of the Colorado River must be ascertained by incorporating state law to give content to the federal law which controls this controversy.[2] This conclusion, however,

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[2]Our conclusion that this controversy should be decided in accordance with state law is not inconsistent with our recent decision in *United States v. Montana*, 604 F.2d 1162, 1173-74 (9th Cir. 1979), *cert. granted*, 445 U.S. 960, 100 S.Ct. 1645, 64 L.Ed.2d 234 (1980), in which we reaffirmed our earlier ruling in *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977), and declined to apply Montana law in determining the title of the Crow Tribe in the bed and banks of the Big Horn River. In *Finch* and *Montana*, the question was whether the treaties creating the Crow Reservation had conferred title to the riverbed on the Indians, thus precluding Montana from acquiring title to the bed upon its admission to the Union. The case did not raise any issue involving subsequent changes in title or deviations in the river's course. Hence, our inquiry began and ended with the construction of the Crow Indian Treaties as applied to a river within the Crow Reservation. This was purely a matter of federal law. In this case, similarly, we must apply federal law to decide whether the statute and executive orders which established the reservation conveyed to the Indians the title to the riverbed. In determining the effect of subsequent changes in the river's course, however, *Wilson* requires that state law serve as the rule of decision. *Cf. Corvallis, supra*, 429 U.S. at 371, 377, 97 S.Ct. 582, 590, 5 L.Ed.2d 550.

does not require reversal of the judgment of the district court if its application leads to no different result. A proper judgment, though based on the wrong grounds, should nonetheless be affirmed. *United States v. Best*, 573 F.2d 1095, 1100-01 (9th Cir. 1978).

(The court compares the federal common law of accretion, on which the district court's opinion is based, to the California law of accretion, the law that should have been applied pursuant to the holding of *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), to determine whether the difference in the laws requires a new trial. The federal law regarding land formed by accretion, "the gradual deposition of soil upon the shore of an upland bounded by water," is that it belongs to the upland owner. Sudden avulsive changes in the course of a river, however, "do not alter the boundaries, which remain in the abandoned riverbed." The district court held that the pre-1920 shifts of the river westward were gradual, therefore the land that was added to the western boundary of the reservation accrued to the Indians according to the common law rule of accretion. The post-1919 Olive Lake Cut, however, effected a sudden avulsive change in the course of the river eastward leaving the reservation's boundaries unaltered. Consequently the district court held that the present boundary was in the abandoned 1919 channel.

The court of appeals finds that the California courts generally agree with the common law doctrine of accretion. Appellants urge that an exception of the California common law rule be applied in this case. Several California cases establish a "last natural channel" rule, which would leave property boundaries unchanged where accretions were artificially caused. Appellants contend that the pre-

1920 westward movement of the river was caused by the Laguna Dam, which was constructed in 1909. They argue that the boundary, following the "last natural channel" rule, would be the 1908 channel of the Colorado River.

The court finds that the "last natural channel" rule does not apply to the facts of this case. California's artificial accretion doctrine is a narrow exception intended to protect state sovereign lands and that the cases are largely limited to tidelands. The court notes that the artificial accretion exception seems to be based "first, on the state's control over obstructions erected in waterways and, second, on the statutory or constitutional inalienability of particular state lands," and that it has never been used to directly benefit a private landowner. The court therefore holds that the exception does not apply in the instant case.

The court also rejects appellants' argument that the reasoning in *People ex rel. Department of Public Works v. Shasta Pipe & Supply Co.*, 264 Cal.App.2d 520 (1968) be applied to the facts of this case. In *Shasta Pipe* a littoral landowner north of the Feather River claimed lands between the old and new channel when the river's course moved southward due to mining and dredging operations, basing his claim in part on the doctrine of accretion. The court in *Shasta Pipe* rejected the accretion claim, holding that title to the abandoned northern channel remained in the state because the change in the river's course was artificially caused. Applying that reasoning to the instant case, appellants argued that, since the westward shift of the Colorado River was artificially caused by construction of the Laguna Dam in 1909, title to the abandoned 1908 channel is in the state of California. The court finds, however, that California has not claimed the 1908 riverbed but only

the westerly half of the 1919 channel. Since California has not appealed from the district court's judgment that it owns half of the 1919 channel, it is res judicata as it affects the state.)

We conclude that appellants cannot invoke California's artificial accretion exception. It follows that the California rule of decision would thus be identical to the federal law doctrine applied by the district court. Therefore, the change in applicable law effected by the Supreme Court's decisions in Corvallis and Wilson would not alter the outcome in this case. The district court properly denied appellants' motion for a new trial.

III

Trask, Circuit Judge (with whom East, District Judge, concurs)

Appellants challenge the district court's determination that the executive orders which established the reservation conveyed to the Indians title to the easterly half of the bed of the median line of the abandoned westerly channel. Here, as in Choctaw Nation v. Oklahoma, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970), "the question is whether the United States intended to convey title to the riverbed to [the Indians]." Id. at 633, 90 S.Ct. at 1335.[7] In ascertaining

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[7]The dissent emphasizes language in *Choctaw Nation* that discusses the degree to which an Indian tribe is displaced, or the degree to which the granting language speaks of establishing a "permanent home" for the tribe, in deciding whether a riverbed was conveyed as part of the tribe's reservation. This inquiry was not utilized as a touchstone for decision in *Choctaw Nation*, however, but rather as a non-exclusive factor properly considered in determining governmental intent. Thus, the extent to which an Indian tribe was displaced, or the degree to which a treaty speaks

such intent, this court must resolve all ambiguities in the orders in favor of the Indians. See, e.g., Squire v. Capoe-

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of establishing a permanent location for a reservation, has no direct bearing *per se* on whether the government intended to convey the riverbed in any particular case. For example, because the history of the treaty involved in *Choctaw Nation* indicated that the Indians were granted "complete soverignty" over their new lands, the Court concluded that all lands within the metes and bounds of the reservation, including the riverbed, were conveyed, so that the Indians might maintain dominion and control over their new home. 397 U.S. at 634-35, 90 S.Ct. at 1336. The Court noted that

> [a]s a practical matter, reservation of the river bed [from the granted land] would have meant that petitioners were not entitled to enter upon and take sand and gravel or other minerals from the shallow parts of the river or islands formed when the water was low. In many respects however, the Indians were promised virtually complete sovereignty over their new lands. . . . We do not believe that petitioners would have considered that they could have been precluded from exercising these basic ownership rights to the river bed, and we think it very unlikely that the United States intended otherwise.

397 U.S. at 635, 90 S.Ct. at 1336 (citations omitted). Thus, the Court looked to the history of the dealings between the Indians and the government and to the permanency expressed in the granting instrument, not as touchstones for decision (as implied by the dissent's analysis), but as indicia of intent.

Similarly, this court's decision in *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676, 97 S.Ct. 2909, 53 L.Ed.2d 1048 (1977), relied upon the fact that the reservation was expressly established as a "permanent home." The court, however, was again concerned with the permanency of the reservation only as evidence of the government's intent. *See* 548 F.2d at 832. As in *Choctaw Nation*, the permanency of the language of conveyance in *Finch* was merely a source from which, in the absence of anything more probative, the government's intent to convey disputed property could be inferred. We need not conclude that such intent was absent in the present case merely because it was neither manifested by language of "permanency" nor inferable from prior government dealings with the tribe. We look instead to other sources to find indications of the government's intent.

man, 351 U.S. 1, 6-7, 76 S.Ct. 611, 614-615, 100 L.Ed. 883 (1956) (quoting Carpenter v. Shaw, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930); Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483 (1832); Navajo Tribal Utility Authority v. Arizona Dept. of Revenue, 608 F.2d 1228, 1233 (9th Cir. 1979). As the Supreme Court has stated:

> The construction [of laws governing the Indians], instead of being strict, is liberal; doubful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years.

Choate v. Trapp, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912), *quoted with approval in Antoine v. Washington*, 420 U.S. 194, 212, 95 S.Ct. 944, 954, 43 L.Ed.2d 129 (1975) (Douglas, J., concurring). *See also Haley v. Seaton*, 281 F.2d 620, 623 (D.C.Cir. 1960); 1 American Indian Policy Review Comm'n, Final Report 109-11 (1977). Applying this rule of construction to the executive orders establishing and defining the reservation, especially the order of May 15, 1876, we conclude that the federal government intended to convey the eastern half of the Colorado River bed to the Indians as part of the reservation.

The first executive order delineating the bounds of the reservation, that of 1873, appears ambiguous. It established the western boundary of the reservation only vaguely—"bounded on the west by the Colorado River."[5] Resolution

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[5]The order of 1874 clarified these boundaries somewhat by setting forth specific mountain peaks to be used as monuments.

of this ambiguity, if indeed there is one,[9] in favor of the Indians results in their receiving title to the eastern half of the riverbed by virtue of this order alone. *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 80-83, 86-87, 43 S.Ct. 60, 61-62, 63-64, 67 L.Ed. 140 (1922). Nevertheless, the order of May 15, 1876, also indicates the government's intent to convey the eastern half of the riverbed. In establishing the metes and bounds of the entire reservation, this order set as part of the western boundary "a direct line toward the place of beginning to the *west* bank of the Colorado River; thence down said *west* bank to a point opposite the place of beginning; thence to the place of beginning." (Emphasis added.) Although the government did not own the western half of the riverbed at the time the reservation was created (that half having already passed to California under the equal-footing doctrine), it is surely a fair inference that in the uncertain legal-boundary atmosphere of the time the government believed that establishing the boundary at the west bank would operate to convey that portion of the bed to which it still had title.[10]

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[9]Similarly vague language has been held clearly to convey a riverbed as part of the reservation being established. *See Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 81-83, 43 S.Ct. 60, 61-62, 67 L.Ed. 140 (1922) (reservation held to include half of riverbed where boundary was "the main channel of the Arkansas River").

[10]The dissent argues that to draw such an inference is "to find sophisticated conveyancing where only the equivalent of a surveyor's imprecise calls" is in evidence, and that the intent of this order was only to fix in a general way the western boundary of the reservation, we do not find it inconsequential, however, that the boundary was fixed by reference to the west bank instead of the east bank. Even if the intent of the order was as the dissent describes it, this does not explain why the boundary was set by the west

That the government intended to convey the riverbed is further supported by the circumstance of the Indians' dependence on the river. In determining whether the government intended that the bed of a body of water be contained within an Indian reservation, courts have frequently examined the history and lifestyle of the reservation tribes. For example, in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918), the Supreme Court concluded that an Indian reservation established as "the body of lands known as Annette Islands" included the adjacent waters and submerged lands as well as the upland islands. *Id.* at 89, 39 S.Ct. at 41. The Court based this conclusion upon its determination that the Indians of the reservation could not have sustained themselves on the upland alone. *Id.* In *Skokomish Indian Tribe v. France*, 320 F.2d 205 (9th Cir. 1963), *cert. denied*, 376 U.S. 943, 84 S.Ct. 797, 11 L.Ed.2d 767 (1964), this court affirmed findings of the district court which examined the Indian's lifestyle and concluded that the tidelands adjacent to the reservation were not intended as part of the reservation. *Id.* at 210. Because the Indian lifestyle was oriented toward river fishing, the ocean waters were not a necessary food source. *Id.* at 210-12. *See also United States v. Holt State Bank*, 270 U.S. 49, 58-59, 46 S.Ct. 197, 200, 70 L.Ed. 465 (1926); *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676, 97 S.Ct. 2909, 53

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bank; additional surveying complexities would have been avoided by adopting either as the boundary, and, absent an intent to convey the riverbed, the logical boundary choice would have been the nearer east bank. Additionally, the dissent ignores that the standard of review in this case requires us to resolve ambiguities in the language of the order in favor of the Indians.

L.Ed.2d 1048 (1977); *Moore v. United States*, 157 F.2d 760, 762-64 (9th Cir. 1946), *cert. denied*, 330 U.S. 827, 67 S.Ct. 867, 91 L.Ed. 1277 (1947). In *United States v. Finch*, *supra*, this court noted that "[those cases in which] an examination of the lifestyles of the Indian tribes was considered particularly important, involved controversies over the location of the exterior boundaries of the lands set aside for the Indians." 548 F.2d at 832 n.19. This is precisely the situation in the case at hand. Examination of the history and lifestyle of the Mohave Indians, the principal tribe on the reservation, suggests that the government intended to convey the riverbed as part of the reservation. At the time the reservation was created, Congress was aware that the Mohaves were heavily dependent upon the Colorado River; having been restricted to their reservation and cut off from traditional hunting grounds, the Indians risked frequent famine without the ability to divert the river and alter its course for irrigation purposes. *See* 5 House Ex.Doc. No. 1, 38th Cong., 2d Sess. 300-301 (1865); Senate Misc.Doc. No. 79, 37th Cong., 2d Sess. 12-14 (1862). *See also Cong. Globe*, 38th Cong. 2d Sess. 1320-22 (1865) (remarks of Arizona Territorial Representative Poston). More telling, however, is a Memorial of the Legislature of Arizona House Misc. Doc. No. 16, 38th Cong. 2d Sess. (1965) (resolution passed by Arizona Territorial Legislature), which was presented to Congress, *see Cong. Globe, supra*, at 1320, and which states in part: "[T]he late superintendent of Indian affairs of the Territory, honorable Charles D. Poston, in view of [the Colorado River Indian Tribes'] scattered and destitute condition, selected and caused to be laid off, *on the east bank and bottom of the Colorado river* a reservation. . . ."

(Emphasis added.) This language clearly suggests that the Territorial Legislature understood the reservation to include the riverbed.[11] Construing these documents in favor of the Indians, we find it probable that those involved with the establishment of the Colorado River Indian Reservation understood it to include the riverbed.

Finally, support for our conclusion that Congress intended to convey the riverbed is suggested by language in *Choctaw Nation, supra:* "[T]he United States seems to have had no present interest in retaining title to the riverbed at all; it had all it was concerned with in its navigational easement via the constitutional power over commerce." 397 U.S. at 635, 90 S.Ct. at 1336. Similarly, in this case, a holding that the United States did not intend to convey the riverbed to itself in trust for the reservation would mean that, at the time the reservation was formed, California owned the land on one side of the river, and the west half of the riverbed, the reservation owned the land on the other side of the river, and the government owned the narrow strip of riverbed between the two. Such ownership would have served no governmental interest existing at the time of the conveyance.

We do not view *United States v. Holt State Bank,* 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926), as controlling

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[11]The dissent suggests that this language is ambiguous, in that "bottom" may refer only to the lowlands that lie alongside the river, and not to the land underneath the river itself. Such lowlands, however, fall within the description "east bank." Thus, if "bottom" is to have any independent meaning, it must refer to the submerged bed of the river. Again, even if an ambiguity were present, the standard of review requires its resolution in favor of the Indians.

authority[12] in this case, as urged by appellants and argued by the dissent. In *Holt State Bank*, as in this case, the Indians' title was merely aboriginal, not in fee simple as the title was in *Choctaw Nation*. In *Holt State Bank*, however, the Court refused to find government intent to convey to the Indians the bed of an interior lake primarily because there was never a treaty, executive order, or any other document establishing the Indian reservation from which such intent could have been inferred. 270 U.S. at 58-59, 46 S.Ct. at 200. The reservation was merely that which was left over after the government, by treaty and other action, appropriated the surrounding lands. Consequently, the only possible basis for Indian ownership of the reservation was aboriginal title. *Id.* In *Choctaw Nation*, on the other hand, the Indians were moved from their aboriginal lands to a new location, where the treaty conveyed the land to them in fee simple. 397 U.S. at 622-26, 90 S.Ct. at 1330-32. In a concurring opinion, Justice Douglas contrasts this basis of

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[12]*Holt State Bank* has not been overruled. It is, however, an aberrational case, and we believe that it was not only distinguished, but also limited by the Supreme Court's decision in *Choctaw Nation, supra, Holt State Bank* relies excessively upon the presumption against conveyances created in reliance on the equal footing doctrine by *Shively v. Bowlby*, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331 (1894). *See* 270 U.S. at 54-55, 46 S.Ct. at 198-199. This presumption had not yet been judicially articulated at the time the conveyance presently concerning us occurred, was not found significant by the Court in *Choctaw Nation*, *see* 397 U.S. at 634, 90 S.Ct. at 634, 90 S.Ct. at 1336, and very possibly is not properly applicable in a case such as this one, where the land in question was conveyed by the government to itself in trust for an Indian tribe (a fact notably absent in *Holt State Bank*). See generally Note, *Indian Rights to Lands Underlying Navigable Waters: State Jurisdiction Under the Equal Footing Doctrine v. Tribal Sovereignty*, 55 N.Dak.L.Rev. 453, 462, 466-67, 469-74 (1979).

ownership with that of the tribes in *Holt State Bank*, in order to distinguish *Choctaw Nation* from the former decision. 397 U.S. at 638-39, 90 S.Ct. at 1338 (Douglas, J., concurring).

The present case can likewise be distinguished from *Holt State Bank*. The Indian tribes of the Colorado River Indian Reservation (predominantly the Mohaves) had been citizens of Mexico, from which nation the United States obtained the lands in question. As prior Mexican citizens, the Indians were deemed not to have any aboriginal title; thus, no treaties ceding such title to the government would have been recognized. *See Cong. Globe*, 38th Cong., 2d Sess. 1320 (1865). The bases for Indian title to the reservation are the executive orders establishing the reservation in trust for the tribes and the more recent Act of Congress fixing beneficial ownership of the reservation in the tribes, *see* Act of April 30, 1964, Pub.L.No. 88-302, 78 Stat. 188. In this case, therefore, unlike *Holt State Bank*, there exist affirmative governmental acts from which intention to grant the bed of the Colorado River can reasonably be inferred.

IV

Although it is true that conveyances by the United States during a state's territorial period are not lightly to be inferred, *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926), it is nevertheless within the power of the United States to make such conveyances if it so desires, *Shively v. Bowlby*, 152 U.S. 1, 48, 14 S.Ct. 548, 566, 38 L.Ed. 331 (1894). We find the evidence in this case sufficient to enable us to conclude that the government intended to convey the eastern half of the riverbed to the Indians when it formed the reservation. Ac-

cordingly, we hold that the boundary of the reservation extends to the midpoint of the 1919 abandoned westerly channel of the Colorado River, and that the eastern half of the riverbed was conveyed by the government to the Indians as part of the reservation.

The judgment of the district court is affirmed.

SNEED, Circuit Judge, dissenting from Parts III and IV of the court's opinion:

I respectfully dissent from Parts III and IV of this opinion and would hold that the pertinent statute and executive orders did not convey to the Indians title to the easterly half of the bed of the Colorado River.

A. Intent of the 1876 Executive Order

My starting point is that a grant establishing an Indian reservation does not always impart title to the bed of boundary rivers or even to bodies of water that are wholly within the reservation. *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926). To determine the scope of the grant one should determine whether Congress and the President, in establishing the reservation, manifested a definite intention to convey title to the riverbed.

The requirement of a definite intention to transfer title to the bed derives from long-established principles of law with respect to navigable waters in territories of the United States. Early in our history, the Supreme Court declared that the United States holds such waters in trust for the future states and that under the "equal footing" doctrine a state acquired title to the beds of such waters upon entering the Union. *Pollard's Lessee v. Hagan*, 44 U.S.

(3 How.) 212, 221-22, 11 L.Ed. 565 (1845). Although Congress may make grants of the lands underlying navigable waters in the territories, it has generally not done so:

> The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that . . . the navigable waters and the soils under them . . . shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future states. . . .

Shivley v. Bowlby, 152 U.S. 1, 49-50, 14 S. Ct. 548, 566, 38 L.Ed. 331 (1894).

In *Holt Bank, supra*, the Supreme Court applied these principles to the Chippewa Indians' claim to the bed of a drained lake. From its earlier decisions, the Court declared "[i]t follows . . . that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U.S. at 55, 46 S. Ct. at 199. The Court observed that the treaty between the United States and the Chippewas reserved lands in a general way for occupation by the Indians but did not affirmatively define the rights of the Indians in reservation lands or exclude others from the use of navigable waters within the reservation.

A different result was reached in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct.. 1328, 25 L.Ed.2d 615 (1970). There the Supreme Court held that the Choctaw and Cherokee Nations had acquired sections of the riverbed of the Arkansas River in the State of Oklahoma under treaties made between those Indian tribes and the United States. The opinion of the Court and the concurring

opinion of Justice Douglas dwelt at some length on the history of relations between those tribes and the federal government, noting that the Indians had been forced, in consequence of repeated violations of promises made by the government, to leave their homelands in the southeastern part of the United States and move first to lands in the Arkansas Territory and then to lands west of the Arkansas Territory, presently located in Oklahoma. *Id.* at 622-28, 90 S.Ct. at 1330-33 (majority opinion); 637-38 nn. 2, 3, 90 S.Ct. 1337-38 nn. 2, 3 (Douglas, J., concurring). The Court also emphasized that the treaties creating the reservation gave the Indians fee simple title to the lands and promised that "'no part of the land granted to them shall ever be embraced in any Territory or State.'" *Id.* at 634-35, 90 S.Ct. at ..... The Indians agreed to move to this reservation in return for "'a *permanent* home . . . which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever.'" *Id.* at 624, 90 S.Ct. at 1336 (emphasis in original). From the language of the treaties as well as from the historical circumstances under which the Indians entered into the treaties, the Court inferred a congressional intention to convey to the Indians title to the bed of the Arkansas River, which was within the boundaries of the reservation.

The present case seems to me to be more similar to *Holt Bank* than to *Choctaw Nation*. The record reveals no history of broken promises or oppression by the government against the Colorado River Indians. The Indians have not been forced to settle hundreds of miles from their aboriginal homelands. More importantly, the act of Congress which created the reservation used none of the language which the Court found determinative in *Choctaw Nation*.

The act did not give the Indians fee simple title to reservation lands, nor did it promise that the reservation would be a "permanent home" or would be independent of any territory or state. The act gave the Indians the same unspecified rights of occupation which the Court in *Holt Bank* found insufficient to convey title to the lake bed. *Holt Bank, supra,* 270 U.S. at 58, 46 S.Ct. at 200; *see also Choctaw Nation, supra,* 397 U.S. at 638-39, 90 S.Ct. at 1338 (Douglas, J., concurring).

Thus, I would hold that the establishment of the Colorado Indian Reservation did not give title to the easterly half of the riverbed. That title was held by the United States until Arizona became a state, at which time Arizona acquired title to the easterly half of the bed under the "equal footing" doctrine.

The majority in support of its holding that title to the easterly half of the riverbed passed to the Indians relies on the language of the 1876 Executive Order which fixed the boundary of the reservation on the west bank of the river. I cannot accord that language the weight given it by the majority because it could not have been intended to convey legal title to the *entire* bed of the river inasmuch as California already owned its westerly half. It escapes me why the Order should be understood to convey that half which the United States ordinarily would hold in trust for a future state. How, it must be asked, could the future state of Arizona come into the Union on an "equal footing" with California if the title to the easterly half of the river were to be given to the Indians in 1876? What the majority overlooks is the reasonable probability that the Executive Order merely fixed the western boundary of the reservation. To construe it as a conveyance of title to the

easterly half of the bed, but not to the westerly half, is to find sophisticated conveyancing where only the equivalent of a surveyor's imprecise calls with respect to the western boundary exist.

Reliance by the majority on the lifestyle of the Indians establishes at best only a reason for fixing the westerly boundary of the reservation so as to include the river. Access to fishing, which was needed, was thus assured. The Executive Order could not, to repeat, have been intended to convey title to one part of the stream bed. Why should it have intended to convey title to the other part in derogation of the responsibility of the United States to the future state of Arizona?

The Memorial of the Arizona Territorial Legislature to which the majority refers to support its position does not, as the majority suggests, "unequivocally" do so. To establish a reservation "on the east bank and bottom of the Colorado River" reasonably could be understood to refer to lands lying alongside the east bank of the river. A not unusual meaning of the word "bottom" when used as a noun is to designate the relatively level and sometimes grassy land lying adjacent to a river. This appears to me a much more probable meaning of the word as used in the Memorial than the assumption of the majority that it refers to the bed of the Colorado River.

The majority, of course, relies upon the canon that requires all ambiguities with respect to the intent of the United States to be resolved in favor of the Indians. Inasmuch as the United States brought this suit on behalf of the Indians its use here may be questioned. As trustee of the Indians the United States must infuse its own action

as the supreme sovereign, burdened with fiduciary duties owing to future states, with ambiguity in order to discharge properly its fiduciary duty to the Indians. That its duty to the Indians is superior to all others within the context of this case is beyond dispute; however, it does not flow automatically from this proposition that the courts should permit an ambiguity always to be resolved in favor of the Indians. A more nearly neutral approach to intent under such circumstances as are presented by this case strikes me as preferable.

Another difficulty with the canon's use is that it almost invariably means less than it appears to. Inasmuch as an ambiguity in the statute and executive orders clearly exists here, its use might be expected to be enough without more to decide the case. That this is not so is revealed by the supporting reasons the majority marshalls. However, how much less it means is never made clear. At its weakest it is but a makeweight. In the present case it should function no more strongly.

B. Location of Easterly Half of Riverbed

I acknowledge that a holding that title to the bed of the Colorado River did not pass to the Indians when the Colorado River Indian Reservation was established would present a difficult problem. It would require the fixing of the location of the easterly half of the riverbed of the Colorado River prior to the construction of the cut-off channel by the Palo Verde Mutual Water Company. This problem could not be solved by adopting the median line of the 1919 channel as the district court did. Adoption of this line rested on the district court's holding that the eastern half of the riverbed belonged to the Indians, a position I reject.

Nor can it be solved by the district court's finding of fact number 11 which reads:

> 11. Immediately prior to said avulsive change, the course and bed of the Colorado River was the westernmost of the two channels shown on the Engle maps, Exhibits 25 and 27 [Appendices C and D], which position of the river is supported by the Yost sketch map, Exhibit 28, labeled "Colorado River 1920."

This finding does not fix the *eastern* limit of the riverbed of the Colorado River. It is to that point, and not beyond, that I would hold the Indians own.

The appellants argue that the eastern limit of the riverbed is fixed by the easternmost channel of the Colorado River as reflected in Appendices C and D. This may not be so. Appendices C and D indicate that an island or sand bar existed between the two channels prior to the construction of the cut-off. Under California law, which appears to be applicable, an island which forms in the bed of a navigable stream belongs to the state. Cal.Civ.Code § 1016 (West 1954). However, an island which is created when a river divides to form two channels belongs to the original owner. *Id.* § 1018. Thus, an island, if such there was immediately prior to the cut-off's construction, may have been part of the reservation and thus continues to belong to the Indians.

The present record simply does not permit fixing with any certainty the location of the eastern half of the riverbed. Therefore, I would remand to the district court for further proceedings.

Appendix B

In the United States Court of Appeals
for the Ninth Circuit

CA No. 77-2295

DC No. CR 72-1621

United States of America,
Plaintiff-Appellee,

v.

Gerald Aranson, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Central District of California

Manuel L. Real, District Judge, Presiding
On Petition to Rehear

Argued and submitted January 15, 1982

Before: TRASK and SNEED, Circuit Judges, and EAST,* District Judge

OPINION

SNEED, Circuit Judge:

[Filed Jan. 10, 1983]

The proper resolution of this appeal has proved as difficult to divine as determining the course of the Colorado River in the Palo Verde Valley during the period of time

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

with which this case is concerned. Both have proved elusive, and, even now, some doubt with respect to both remains. The appeal is from the decision of the district court adjudging certain lands in what is referred to as the Olive Lake region of the Palo Verde Valley to be the property of the United States, acting as trustee for the Colorado River Indians, and ordering appellants to pay damages because of their wrongful occupation of those lands. Appellants maintain that the district court should have granted their motion for a new trial because of a change in the applicable law. Appellants also contend that the district court erred in concluding that the Colorado River Indian Reservation included the easterly half of the bed of the Colorado River. Affirmed in part and reversed and remanded in part.

I

In 1865, Congress created the Colorado River Indian Reservation by setting apart certain lands within what was then the Territory of Arizona. Act of Mar. 3, 1865, ch. 127, 13 Stat. 541, 559. The boundaries of the Reservation were modified or redefined by executive orders issued on November 22, 1873; November 16, 1874; May 15, 1876; and November 22, 1915. *See Executive Orders Relating to Indian Reservations, 1855–1922*, pt. I, at 6, 7; pt. II, at 5, 6 (1975).

The Reservation extended westward to, and in some places beyond, the Colorado River, which formed the boundary between California and Arizona. The river, however, did not maintain a constant course. Over the years it carved out various channels through the Palo Verde Valley. Three of those channels are critical to this case. For our purposes, the 1908 channel refers to the course followed by the river before the completion in 1909 of the Laguna Dam, which

is located downstream from the Palo Verde Valley. It appears in Appendix A to this opinion. In the decade following completion of the dam, the river moved gradually westward, as soil was eroded from the California bank and deposited on the Arizona side. By 1915 its location was as depicted by Appendix B, and by 1919 the course of the river had formed a bend or loop known as the "Oliver Lake Bend" which Appendices C and D reflect. We shall refer to the river's course at this time as the 1919 channel. In 1920, the Palo Verde Mutual Water Company, with the authorization of the United States Department of the Interior, constructed a cut-off channel across the neck of this bend. Appendix E shows the location of the cut-off as proposed. By 1921, the entire river had moved into this cut-off channel, described as the Olive Lake Cut, and was following a course to the east of both the 1908 channel and the westerly, 1919 channel. We shall refer to this last course as the 1921 channel. The record contains no drawing of the 1921 channel although Appendix F fixes the channel as of April 1925 somewhat east of the present course of the river. Obviously the 1921 channel was also east of the present river.[1]

Uncertainty over the shifting state border led California and Arizona to fix the line in a Boundary Pact which was approved by Congress in 1966. Act of Aug. 11, 1966, Pub. L. No. 89-531, 80 Stat. 340. The Pact did not affect property claims or titles, and the states' ratifying statutes provided that titles, rights, or claims would not be prejudiced by the Pact's designation of the state boundary line. 1963 Ariz. Sess. Laws ch. 77, § 5, reprinted in annotation to Ariz. Rev.

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[1]The course of the river now appears to be somewhat to the west of the Olive Lake Cut. In resolving the issues of this case, however, we need not consider changes occurring after 1921.

Stat. Ann. § 41-522 (West 1974); 1963 Cal. Stats. ch. 859, § 4, reprinted in annotation to Cal. Gov't Code § 175 (West 1980).

On July 17, 1972, the United States in its capacity as trustee for the Indians commenced this action seeking to quiet title to those lands situated on the California side of the present channel and east of the median line of the 1919 channel. Various individuals and corporations, as well as the Palo Verde Irrigation District and the State of California, were named as defendants. The private defendants had acquired lands in the Olive Lake region, apparently from previous occupants, some years after the construction of the Olive Lake Cut but before the adoption of the Arizona-California Boundary Pact. The Palo Verde Irrigation District, a public district of the State of California, claims lands in the Olive Lake region and regulates water usage in the vicinity. The Indians contended, however, that the Colorado River Indian Reservation extended to the median line of the 1919 channel and that, because the Olive Lake Cut had effected an avulsive change in the course of the river, their title to this land was never lost. They therefore asked that the defendants be required to remove themselves and their personal belongings from the land and to pay damages for wrongful possession.

At trial, the dispute focused on the issue of whether the change in the river's course from the 1919 channel to the 1921 channel was the result of avulsion or accretion. The district court found that the change had been avulsive and concluded that title to the lands had remained in the Indians. The district court also found that the Reservation included the eastern half of the bed of the river. Thus, the

court held that the Indians presently hold title to the lands east of the median line of the 1919 channel, and that the State of California owns the bed west of that median line. The court also ordered the defendants, except the State of California, to pay damages for wrongful possession.

Although the district court announced its decision on November 17, 1976, the court's findings of fact, conclusions of law, and judgment were not filed until February 11, 1977. In the intervening period, the Supreme Court rendered its decision in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), in which the Court overruled its previous decision in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973). Arguing that the district court had relied on federal law and that under *Corvallis* the case should be resolved under state rather than federal law, the defendants, except the State of California, moved for a new trial. The motion was denied, and defendants, again save for the State of California, appealed.

Appellants raise two issues. They contend that the property dispute is governed by California law, not federal law. Under California law, in appellants' view, the Indians would not have obtained title to any accretions which were artificially caused. Hence, appellants request a new trial in order to prove that the lands in question were deposited on the Arizona side of the river as a result of artificial accretions caused by the construction of the Laguna Dam in 1909. Appellants also contend that the Indian Reservation did not include the eastern half of the riverbed and that the district court's determination of the Reservation's western boundary was thus incorrect. We shall address these issues separately.

II.

In *Bonelli Cattle Co. v. Arizona, supra,* the Supreme Court held that a dispute between a private claimant and the State of Arizona over title to land within the abandoned bed of the Colorado River was governed by federal law. Consistent with *Bonelli*, the district court decided this case on the basis of federal law. The overruling of *Bonelli* by *Corvallis* enables the appellants to argue that his case must be decided according to state, not federal law, and that the district court should thus have granted their motion for a new trial. The appellee contends that *Corvallis* is inapplicable here because, unlike the Willamette River, which was the source of the controversy in *Corvallis*, the Colorado River until 1966 formed the boundary between two states.

We believe this dispute concerning the proper application of *Corvallis* was resolved by the Supreme Court's recent decision in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979). The claimant in *Wilson* was a tribe of Indians whose reservation, located in Nebraska, was bounded on the east by the Missouri River. Prior to a compact made in 1943, the river had also marked the state boundary between Nebraska and Iowa. The tribe claimed lands that had once been part of the reservation but which, due to changes in the river's course, had passed to the Iowa side of the river. The Supreme Court held that the Indians' claim was governed by federal law but that state law should be adopted as the rule of decision. *Id.* at 669-76. This holding governs this case. It follows that the substantive rule of decision in this case with respect to issues arising from changes in the course of the Colorado River must be ascertained by

incorporating state law to give content to the federal law which controls this controversy.[2] This conclusion, however, does not require reversal of the judgment of the district court if its application leads to no different result. A proper judgment, based on the wrong grounds, should nonetheless be affirmed. *United States v. Best*, 573 F.2d 1095, 1100-01 (9th Cir. 1978).

To ascertain whether state law would alter the result reached below we must determine which state's law should provide the rule of decision. The appellants assert that California law governs, while the appellee maintains that, assuming state law is to be employed, it must be that of Arizona. We agree with the appellants. The land in dispute

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[2]Our conclusion that this controversy should be decided in accordance with state law is not inconsistent with our recent decision in United States v. Montana, 604 F.2d 1162, 1173-74 (9th Cir. 1979), *cert. granted*, 445 U.S. 960 (1980), in which we reaffirmed our earlier ruling in United States v. Finch, 548 F.2d 822 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676 (1977), and declined to apply Montana law in determining the title of the Crow Tribe to the bed and banks of the Big Horn River. In *Finch* and *Montana*, the question was whether the treaties creating the Crow Reservation had conferred title to the riverbed on the Indians, thus precluding Montana from acquiring title to the bed upon its admission to the Union. The case did not raise any issue involving subsequent changes in title or deviations in the river's course. Hence, our inquiry began and ended with the construction of the Crow Indian Treaties as applied to a river within the Crow Reservation. This was purely a matter of federal law. In this case, similarly, we must apply federal law to decide whether the statute and executive orders which established the Reservation conveyed to the Indians the title to the riverbed. In determining the effect of subsequent changes in the river's course, however, *Wilson* requires that state law serve as the rule of decision. *Cf. Corvallis, supra*, 429 U.S. at 371, 377.

presently is within the State of California. That is controlling unless the Arizona-California Boundary Pact dictates a different conclusion. The Pact itself dictates no choice as to what law shall govern disputes over land titles. However, in ratifying the Pact, each state adopted a "preservation of rights" provision, whcih declared:

> Nothing contained in the provisions of this act . . . shall prejudice the titles, rights or claims of any person, public or private, natural or artificial, to any of the lands herein involved whether such titles, rights, or claims arise or exist upon the basis that the lands affected by the designation of boundary as set forth in the compact and in this act were previously a part of the State of Arizona and have now become a part of the State of California, or were previously a part of the State of California and have now become a part of the State of Arizona or otherwise; . . .

1963 Ariz. Sess. Laws ch. 77, § 5, reprinted in annotation to Ariz. Rev. Stat. Ann. § 41-522 (West 1974); 1963 Cal. Stats. ch. 859, § 4, reprinted in annotation to Cal. Gov't Code § 175 (West 1980). This provision, as we read it, alters the normal assumption that property located in California is subject to California law only if the lands in dispute were part of Arizona before the adoption of the Pact and if the Indians' claims would be prejudiced by the application of California law. Neither condition exists, however.

The record, as demonstrated by Appendix F, supports appellants' contention that these lands were part of California, not Arizona, before the adoption of the Pact. Appellants, who claim title under the laws of California, have been in possession of the land since well before the Pact; indeed, their possession of the lands is not only conceded

but is the basis of the claim for damages against them. In addition, one of the appellants, the Palo Verde Irrigation District, is a public district organized under the laws of California. The District, which was created by statute in 1923, Cal. Water Code App. § 33-2 (West 1968), has authority over water usage in the Palo Verde Valley; the District is empowered to levy taxes for this purpose, *id.* § 33-28, and holds liens for unpaid taxes and water tolls on the lands in issue, *id.* § 33-28f. *See* Clerk's Record, vol. I., at 26. In view of these facts, it is clear that the area was within the jurisdiction of California prior to adoption of the Boundary Pact.[3]

Moreover, the claim of the Indians is not prejudiced by application of California law. Although Arizona case law relevant to this issue is scant, the leading case, *State v. Bonelli Cattle Co.*, 107 Ariz. 465, 469 (1972), *rev'd on other grounds*, 414 U.S. 313 (1973), cites the California law on artificial accretion with approval. Because our resolution of the relevant issue employs the same law, it is unlikely that application of Arizona law would alter our result. Thus, our choice of law does not prejudice the Indians.

Having concluded that the law of California should be adopted as the federal rule of decision in this case, we now

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[3]In arguing that these lands were part of Arizona, the Indians may be suggesting that before the Pact, Arizona was rightfully entitled to these lands even though California in fact exercised jurisdiction over them. We do not believe, however, that the Boundary Pact or the ratifying statutes require us to determine whether Arizona could rightfully have claimed sovereignty over these lands, since the Pact was adopted precisely for the purpose of foreclosing such controversies. *Cf.* Nebraska v. Iowa, 406 U.S. 117, 112-23 (1972). The Indians are not entitled to make for Arizona a claim which Arizona has relinquished.

must decide whether a new trial is necessary. Our approach is first to review the content of the applicable federal common law, then to examine California law to determine whether it differs and, if so, whether that difference requires a new trial.

In examining California law, we shall be mindful that California courts are required by statute to follow common law rules unless those rules conflict with state law or the federal constitution. Cal. Civ. Code § 22.2 (West 1954).

Under the federal and common law rule, land formed by a process of accretion, or gradual deposition of soil upon the shore of an upland bounded by water, belongs to the upland owner. Hence, if a river forming the boundary between the property of two upland owners changes its course by a gradual process of erosion from one bank and accretion to the other, the boundary moves with the river. However, sudden or "avulsive" changes in a river's course do not alter the boundaries, which remain in the abandoned riverbed. *See County of St. Clair v. Lovingston*, 90 U.S. (23 Wall.) 46 (1874); 5A *Thompson on Real Property* §§ 2560, 2561 (repl. 1978).

The district court in this case applied federal law and concluded that as the Colorado River moved slowly westward between 1909 and 1920, the western boundary of the Reservation moved with it. However, the Olive Lake Cut, which diverted the river eastward to its 1921 channel, effected an avulsive change and thus left the Reservation's boundary unaltered. The boundary thus remained at the abandoned westerly channel. Appellants do not deny that the district court's judgment is correct as a matter of

federal law. As indicated above, the common law does not differ.

California courts have expressed approval of the common law doctrine of accretion. *See, e.g., Forgeus v. County of Santa Cruz*, 24 Cal.App. 193, 199-200 (1914). However, certain California cases have created a limited exception to the common law rules by distinguishing between accretion which is naturally caused and accretion which results from artificial causes, such as man-made dams or other structures which may obstruct the natural movements of a body of water. It is this exception to which appellants pin their hopes. They maintain that these cases establish a "last natural channel" rule under which artificially caused accretion leaves property boundaries unchanged. A new trial is necessary, they assert, to enable them to prove that the river's westward movement before 1920 was artificially caused by the construction of the Laguna Dam in 1909. From this it would follow, the appellants continue, that the western boundary of the Reservation should thus be determined not by the river's westerly, 1919 channel, as the district court held, but rather by the 1908 channel which the river followed before the closure of the dam.

We do not believe that California courts would apply the "last natural channel" rule to the facts of this case. The State of California so asserts in an *amicus curiae* brief which points out that California's exception for artificial accretions applies only to state sovereign lands. Our review of the California decisions from which the artificial accretion exception is derived convinces us that the State of California's position is correct. California courts have con-

sistently viewed the exception as a doctrine designed to protect state sovereign lands. Thus, in *Carpenter v. City of Santa Monica*, 63 Cal.App.2d 772, 787 (1944), the court stated:

> There are no doubt many federal cases, following the leading case of County of St. Clair v. Lovingston, 23 Wall. (90 U.S.) 46 [23 L.Ed. 59], relied upon by appellant, which hold that as between competing upland owners, or as between upland owners and others not claiming tidelands as successors of the state, artificial accretions belong to the upland owner. This is the general common law rule and probably the rule in this state. (*Forgeus v. County of Santa Cruz*, 24 Cal.App. 193 [140 P. 1092].) An entirely different rule may apply, however, where the upland owner attempts to assert title to lands formed by artificial accretions against the claim of the state, or its successor in interest, that such lands are tidelands . . . .
>
> When the California cases are considered there can be no reasonable doubt but that the rule in this state is that in a controversy between the state, or its grantees, and the upland owner, artificial accretions belong to the state . . . .

Later, in *People v. Hecker*, 179 Cal.App.2d 823, 837 (1960), the court declared:

> Relying upon the federal and common-law rule that accretion accrues to the upland owner even though assisted by artificial means, appellant submits that under section 22.2, Civil Code, it shall be the rule of decision in California courts. The law of this state does not support such a position. ***The within controversy is between the littoral owner and the state, and as such the rule urged by appellant does not apply.***

(Emphasis added.) These pronouncements indicate that the artificial accretion doctrine is a narrow exception intended only to protect the state's title to its sovereign lands.[4]

This interpretation is consistent with the reasons which underlie the artificial accretion exception. Although the purposes of the exception are admittedly obscure, two reasons for distinguishing between natural and artificial accretion are discernible. The first is reflected by the earliest case to distinguish between artificial and natural accretion, *Dana v. Jackson Street Wharf Co.*, 31 Cal. 118 (1866), which emphasized that since upland owners have no right to create obstructions to the natural flow of waterways, such obstructions therefore are within the control of the state. "By the common law any erection below high water mark without license, is regarded as an encroachment and intrusion on the King's soil, which the King may demolish, seize or arrent at his pleasure." Id at 120. The court then appears to have reasoned that since an artificial obstruction in the body of water is in a sense within the state's control, the state may also claim any accretion caused by such an obstruction. Thus, in *Forgeus v. County of Santa Cruz, supra*, 24 Cal.App. at 200, after upholding the claim of an upland owner to accretions

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[4]It is true that in *City of Long Beach v. Mansell*, 3 Cal.3d 462, 469 n.4 (1970), the California Supreme Court referred to the artificial accretion exception without stating that the exception applied only to state sovereign lands. This statement occurred in a footnote as part of a two sentence summary of the rules governing accretion and avulsion. The footnote was only peripherally related to the issues in the case. Nothing in the footnote suggested, and we think it unlikely, that the court intended by this cursory description of the law to alter the rules governing accretion as more fully explained in earlier decisions.

allegedly caused by the construction on the owner's land of a country roadway, the court added: "Clearly, there is a distinction between this case and that where a structure is erected, by the state or municipality, on land below the line of ordinary high water. In the latter case the deposit of alluvion caused by such structure would not inure to the benefit of the riparian owner."

A more important reason for the artificial accretion exception was also suggested in *Dana*. The court, observing that the boundaries of the San Francisco waterfront upon which the plaintiff property was situated were statutorily definied, concluded that to permit a landowner to acquire artificial accretions would alter waterfront boundaries in contravention of that statute. *Dana, supra*, 31 Cal. at 121. Similarly, cases which have denied the claims of upland owners to land formed by artificially caused deposits upon a seashore appear to be based on a provision of the California Constitution which forbids alienation of tidelands located within two miles of an incorporated city or town. Cal. Const. art. 15, § 3 (repealed 1976; current version at art. 10, § 3). Thus, in *Patton v. City of Los Angeles*, 169 Cal. 521, 525 (1915), the California Superior Court declared that tideland which had been filled in by accretion

> was once tideland, and . . . this being so, it was reserved from sale, and was not alienable by any state officer under any law, . . . and, therefore, no artificial embankment, made by third persons, or made or suffered by state officers or agents, nor any accretion to the adjacent upland caused thereby, could operate to divest the state of its title to the tide land so reserved.

The court did not explain why its reasoning would not be equally applicable to instances of natural accretion. Pos-

sibly it is because artificial accretion more resembles the intentional alienation of state lands, which the California Constitution forbids, than does the process of natural accretion. In any event, nearly all the artificial accretion cases involved tidelands.

Hence, we conclude that California's artificial accretion exception appears to be based, first, on the state's control over obstructions erected in waterways and, second, on the statutory or constitutional inalienability of particular state lands, especially tidelands. It was created to protect the sovereign lands of the state. This purpose indicates that the exception need not be extended to private landowners. Support for this view is provided by the fact that the exception has never been applied directly to benefit a landowner other than the state or its assignee.

The case most helpful to appellants is *People ex. rel. Department of Public Works v. Shasta Pipe & Supply Co.*, 264 Cal.App.2d 520 (1968). The controversy in that case was caused by the movement of the Feather River, which in the disputed area ran from east to west. Because of mining and dredging operations, the river's course had moved southward in the century before 1960, and when the state acted in 1961 to condemn lands in the area, the owner of the land to the north of the original channel claimed title to the lands lying between the old and new channels under the doctrines of accretion, adverse possession, and occupancy. After this claim was rejected in the superior court, the court of appeals remanded for trial on the issues of adverse possession and occupancy but apparently agreed that the landowner could not claim the lands in question on the basis of accretion. Though the opinion discusses the accretion doctrine only briefly, the court

seems to have reasoned that because the change in the river's course was caused by human interference, the state had retained title to the original bed rather than acquiring title to the new bed. *Id.* at 535. The property of the upland owner on the north, therefore, could not be extended southward by accretion because it was blocked on the south by a strip of land, the river's abandoned bed, which belonged to the state. As a consequence, perhaps the owner of land lying south of the original bed was an incidental beneficiary of the artificial accretion doctrine. By preserving the state's title to the abandoned bed, owners south of the original bed may have had their property preserved against an accretion loss.

Using this reasoning, appellants argue that if the westward movement of the Colorado River prior to construction of the Olive Lake Cut was caused by the erection of the Laguna Dam in 1909, then California retained title to the 1908 channel with the result that the Reservation could not expand westward. The difficulty that the appellants encounter is that California has not claimed title to the 1908 bed. Rather, it has claimed the westerly half of the abandoned course followed by the river before the Olive Lake Cut was made in 1920. Moreover, this claim has been approved by the district court.[5] California has not ap-

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[5]There has been some uncertainty over which bed was awarded to the State of California in the proceedings below. At oral argument, counsel for the United States, representing the Indians, admitted that he did not know which bed the state had received in the judgment. In a Supplemental Memorandum, appellants declare that the State of California was awarded the bed west of "the midstream of the Colorado River *prior to its avulsive change. . . .*" (emphasis added), thus referring to the 1919 channel; later in the same memorandum, however, appellants suggest that California

pealed from the district court's judgment; it is *res judicata* and unreviewable by us. *International Manufacturing Co. v. Landon, Inc.*, 327 F.2d 824 (9th Cir. 1964). Hence, appellants cannot assert that their property boundaries were fixed by a protective barrier of state land.[6]

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owns the western half of the 1908 riverbed. Because of this confusion, we quote finding 14 and 15 from the district court's findings of fact:

> 14. With respect to the lands shown on said Exhibit 9, as lying between the Colorado River as shown on Exhibit 9 and the median line as shown and described on Exhibit 9 [the median line of the westerly, 1919 bed is indicated on Exhibit 9], said lands, comprising about 1912 acres, are owned by the United States of America in trust for the benefit of the Colorado River Tribes. No part of said lands have ever been disposed of by the United States of America by patent or otherwise.
>
> 15. All that part of the abandoned bed of the Colorado River lying westerly of the median line described on Exhibit 9, as of the time the river commenced flowing through the cut-off constructed by the Palo Verde Mutual Water Co. is owned by the State of California.

[6]Although we need not determine whether, but for the judgment below, and assuming that the river's westward movement was artificially-caused, California would rightfully be entitled to the 1908 bed rather than to the westerly bed, we do note that appellants' position on this issue is open to dispute. In the first place, it is not clear whether this issue, which would involve a determination of the boundary betwen California and Arizona during the period in question, would be governed by state or federal law. Under federal law, as we have observed, appellants' contention that the westward movement of the river was artificially-caused would be irrelevant. But even under state law, the issue is uncertain. To be sure, the court in *Shasta* indicated that the state retained title to the original riverbed and did not own the new bed after the Feather River changed its course as a result of artificial causes. In that case, however, the court noted that "the state does not claim the bed of the river in its present location." *Shasta, supra*, 264 Cal.App.2d at 535, 70 Cal.App.2d 618. If, on the other hand, the state were to relinquish its claim to the old bed and assert ownership over the newly

We conclude that appellants cannot invoke California's artificial accretion exception. It follows that the California rule of decision would thus be identical to the federal law doctrine applied by the district court. Therefore, the change in applicable law effected by the Supreme Court's decisions in *Corvallis* and *Wilson* would not alter the outcome in this case.

III.

TRASK, Circuit Judge:

Appellants challenge the district court's determination that the executive orders which established the Reservation conveyed to the Indians title to the easterly half of the bed of the Colorado River, and, therefore, title to lands east of the median line of the abandoned westerly channel. Here, as in *Choctaw National v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970), "the question is whether the United States intended to convey title to the riverbed to [the Indians]." *Id.* at 633, 90 S.Ct. at 1335. Although an opinion was filed in this case on March 30, 1981, the panel withdrew its disposition in April, 1981, for reconsideration in view of *Montana v. United States*, 450 U.S. 544 (1980).

In *Montana v. United States*, the Supreme Court reaffirmed the presumption against conveyances by the United States of lands beneath navigable waters during a state's territorial period: "As a general principle, the Federal Government holds such lands in trust for future States, to be granted to such States when they enter the

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formed bed, thus declining to invoke the artificial accretion exception, as the state did in this case, it is not clear that a court applying California law would be required to reach the same result arrived at in *Shasta*.

Union and assume sovereignty on an 'equal footing' with the established States." *Id.* at 551. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 222-23, 229 (1845). In deciding a question of title to land beneath navigable waters the Court stated:

> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, *United States v. Oregon, supra*, at 14, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." *United States v. Holt State Bank*, 270 U.S., at 55. See also *Shively v. Bowlby, supra*, at 48. A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, *United States v. Oregon, supra*, at 14, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," *United States v. Holt State Bank, supra*, at 55, or as rendered "in clear and especial words," *Martin v. Waddell, supra*, at 411, or "unless the claim confirmed in terms embraces the land under the waters of the stream," *Packer v. Bird, supra*, at 672.

450 U.S. at 551. The Court, however, has recognized that Congress may convey lands underlying navigable waters and defeat the equal footing doctrine if the conveyances were necessary to satisfy international obligations, to promote or facilitate commerce among the States or with foreign nations, or to carry out other appropriate public purposes. *United States v. Holt State Bank*, 270 U.S. 49, 54-55 (1925); *Shively v. Bowlby*, 152 U.S. 1, 48 (1894).

The *Montana* decision forecloses any argument that Congress intended to convey lands underlying navigable waters unless an express reference to the bed beneath the waters

can be found in the grants establishing the reservation. *See* 450 U.S., at 542. For example, an implied conveyance cannot be upheld on the grounds that the navigable water lay wholly within the boundaries of a reservation, *id.* at 552; *see United States v. Holt State Bank*, 270 U.S. at 57-58, or that treaties creating the reservation contain a right of exclusive tribal occupancy. *Montana v. United States*, 450 U.S. at 554-55.

Turning to the facts in the present case, even the strongest language in the various official documents defining the reservation's western boundary falls short of the specificity required by *Montana*. We conceded in our earlier opinion (subsequently withdrawn by the panel for reconsideration in light of *Montana*) that the first executive order issued in 1873 delineating the bounds of the Reservation was ambiguous. It established the western boundary of the Reservation only vaguely as "bounded on the west by the Colorado River." We nevertheless construed the ambiguity in favor of the Tribes—an approach *Montana* rejects.[8] We next

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[8]Although the inexact and ambiguous language in the conveyances to the Choctaw and Cherokee Tribes weighed in favor of the Indians in *Choctaw Nation*, similarly vague language in the Crow treaties was deemed insufficient in *Montana*. As Justice Stevens indicates in his concurring opinion in *Montana*, the Court's reliance in *Choctaw Nation* on the rule of construction favoring the tribes arguably could be read as an indication that the equal footing presumption against disposition by the United States of land under navigable waters did not apply to Indian reservations. *Montana v. United States*, 450 U.S. at 567-68. This was precisely the conclusion we reached in our first disposition of this case. Although Justice Stevens joins the *Montana* majority in holding that *United States v. Holt State Bank* states the rule with *Choctaw Nation* as the exception, it is noteworthy that his concurrence recognizes that the exact opposite conclusion was not unreasonable. The debate

examined Order of May 15, 1876, which established the metes and bounds of the Reservation. This order set as part of the western boundary "a direct line toward the place of beginning to the *west* bank of the Colorado River; thence *down said west bank* to a point opposite the place of beginning." (emphasis added). Although the United States did not own the western half of the riverbed in 1876 because it had passed by that time to California under the equal footing doctrine, we found that "it is surely a fair inference that in the uncertain legal-boundary atmosphere of the time the government believed that establishing the boundary at the west bank would operate to convey that portion of the bed to which it still had title." Again, this analysis does not survive *Montana's* requirement that Congress' intent be expressed in " 'clear and especial words' or 'definitely declared or otherwise made very plain,' . . . . " 450 U.S. at 554.

In our discussion of the history and lifestyle of the Tribes, we referred to a Memorial of the Legislature of Arizona, House Misc. Doc. No. 16, 38th Cong., 2d Sess. (1865); Cong. Globe, 38th Cong., 2d Sess. 1320 (a resolution passed by the Arizona Territorial Legislature which was later presented to Congress). The resolution states in part: "[T]he late superintendent of Indian affairs of the Territory, honorable Charles D. Poston, in view of the [Tribes'] scattered and destitute condition, selected and caused to be laid off, *on the east bank and bottom of the colorado river* a reservation . . . ." (emphasis added). Although we interpreted this language to show that the Territorial Legislature under-

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concerning the logic of the *Montana* decision undoubtedly will continue for some time. Nevertheless, the Supreme Court has spoken. *See* Barsh and Henderson, *Contrary Jurisprudence; Tribal Interests in Navigable Waterways Before and After* Montana v. United States, 56 Wash. L. Rev. 627 (1981).

stood the Reservation to include the riverbed, other references in the report made by Charles Poston suggest that the word "bottom" may simply refer to the lowlands that lie alongside the river rather than the riverbed itself. For example, in his statement before Congress, Representative Poston explained that the Tribes "cultivate the bottom lands of the Colorado River where an overflow affords sufficient moisture; the failure of an overflow, which sometimes happens, is considered a great calamity, and breeds a famine." *Id.* Another report of the Tribes' agriculture describes a "fine wide bottom, in which last year, were the cultivated fields of the Indians." House Ex. Doc. 76, 34th Cong., 3d Sess. 34, 37 (1857) (letter of Capt. S. P. Heintzelman); Cong. Globe, *supra*, at 1320. This reference to growing crops in the river bottom suggests that the riverbed itself is not what the term "bottom" described.

Reaching the conclusion that the documents establishing the reservation did not convey the riverbed does not end our analysis under *Montana*. The establishment of an Indian reservation can be an "appropriate public purpose" justifying congressional conveyance of a riverbed if sufficient "public exigency" existed to prompt Congress to depart from the equal footing doctrine. 450 U.S. at 556; *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1919); *Skokomish Indian Tribe v. France*, 320 F.2d 205, 212 (9th Cir. 1963).

Significantly, the Court in *Montana* did not overrule its earlier decision in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918), in which the Court construed that an Indian reservation established as "the body of lands known as the Annette Islands" included the adja-

cent waters and submerged lands as well as the upland islands. *Id.* at 89. The facts in *Alaska Pacific Fisheries,* are instructive. In that case, a commercial fishing operation had erected a large fish-trap offshore near the island on which the Indians had settled. The Court indicated that the trap would catch about 600,000 salmon a season which would substantially reduce the natural supply of fish accessible to the Indians. 248 U.S. at 87. The use of the adjacent fishing grounds was found to be essential to the Indian's survival. Based on its finding that the Indians of the reservation could not have sustained themselves on the upland areas alone, the Court concluded that Congress intended to convey the lands beneath navigable waters as part of the reservation. In its *Montana* decision, the Court indicated that the lifestyle of the Crow Tribe was unlike that of the Indians in *Alaska Pacific Fisheries:*

> [e]ven though the establishment of an Indian reservation can be an 'appro- priate public purpose' within the meaning of *Shively v. Bowlby,* 152 U.S., at 48, justifying a congressional conveyance of a riverbed, *see, e.g., Alaska Pacific Fisheries v. United States,* 248 U.S. 78, 85, the situation of the Crow Indians at the time of the treaties presented no 'public exigency' which would have required Congress to depart from its policy of reserving ownership of beds under navigable water for the future States. *See Shively v. Bowlby, supra,* at 48. *As the record in this case shows, at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.*

Montana v. United States, 450 U.S. at 556.

Thus, we conclude that the Supreme Court's decision in *Montana* permits a court to infer congressional intent to convey the bed beneath navigable waters if the Indians can prove they depended heavily on the particular body of water. *See Puyallup Tribe of Indians v. Port of Tacoma*, 525 F. Supp. 65 (W.D. Wash. 1981).

Unlike *Alaska Pacific Fisheries*, the Tribes' history and lifestyle in this case do not provide grounds for an exception to the equal footing doctrine. The record does not reflect that the Indians were so dependent on the river that Congress would have intended to depart from the equal footing doctrine and convey the river bed. The Tribes have submitted considerable scholarly documentation to support a finding that a "public exigency" existed to justify a grant of the riverbed. We find this authority unpersuasive.

The issue of aboriginal title was presented to this court on rehearing. Unfortunately the record from the district court does not allow us to make a determination on this issue. However, we do feel the issue is of sufficient import to allow the parties to address it on remand.

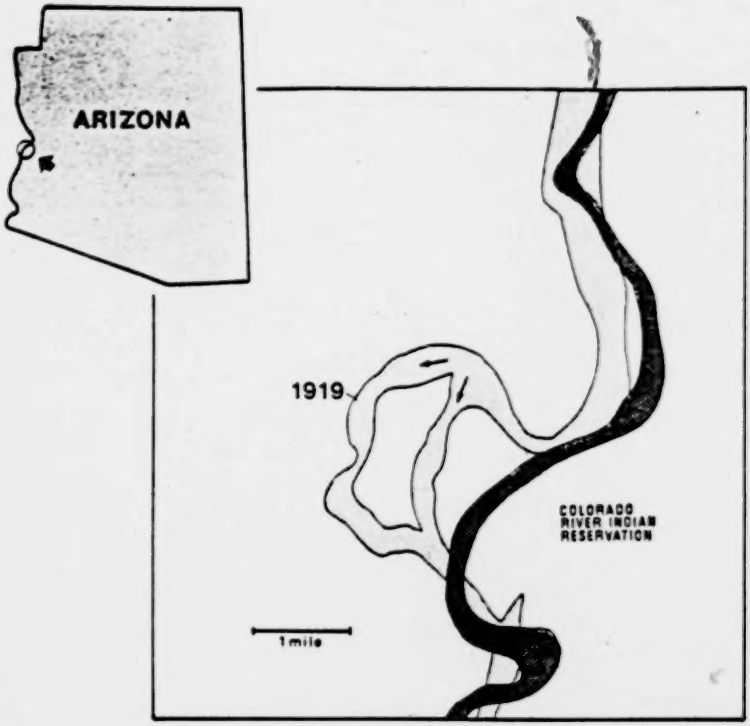
IV

Although it is true that conveyances by the United States during a state's territorial period are not lightly to be inferred. *United States v. Holt State Bank*, 270 U.S. 49, 55, 46 S.Ct. 197, 199, 70 L.Ed. 465 (1926), it is nevertheless within the power of the United States to make such conveyances if it so desires, *Shively v. Bowlby*, 152 U.S. 1, 48, 14 S.Ct. 548, 566, 38 L.Ed. 331 (1894). We find the evidence in this case insufficient to enable us to conclude

that the government intended to convey the eastern half of the riverbed to the Indians when it formed the Reservation. Accordingly, we hold that the eastern half of the river bed was not conveyed by the government to the Indians as part of the Reservation.

The judgment of the district court is affirmed in part, reversed in part and remanded. On remand the district court should determine the issue of aboriginal title and the correct boundary of the Reservation.

APPENDIX C.



CHANNEL OF THE COLORADO RIVER (PALO VERDE VALLEY) BEFORE 1920 CUTOFF AND TODAY

SOURCE: EXHIBIT #25